

**PROPOSED AMENDMENTS TO  
SENATE BILL 476**

1 On page 1 of the printed bill, line 2, after “environment;” insert “; creat-  
2 ing new provisions; amending ORS 465.325; and declaring an emergency”.

3 Delete lines 4 through 29 and delete pages 2 and 3 and insert:

4 **“SECTION 1.** ORS 465.325 is amended to read:

5 “465.325. (1)(a) The Director of the Department of Environmental Quality,  
6 in the director’s discretion, may enter into an agreement with any person  
7 including the owner or operator of the facility from which a release ema-  
8 nates, or any other potentially responsible person to perform any removal  
9 or remedial action if the director determines that the actions will be properly  
10 done by the person. Whenever practicable and in the public interest, as de-  
11 termined by the director, the director, in order to expedite effective removal  
12 or remedial actions and minimize litigation, shall act to facilitate agreements  
13 under this section that are in the public interest and consistent with the  
14 rules adopted under ORS 465.400. If the director decides not to use the pro-  
15 cedures in this section, the director shall notify in writing potentially re-  
16 sponsible parties at the facility of such decision. Notwithstanding ORS  
17 chapter 183, a decision of the director to use or not to use the procedures  
18 described in this section shall not be appealable to the Environmental  
19 Quality Commission or subject to judicial review.

20 **“(b)(A) At least 30 days before an agreement is entered into under**  
21 **this section, the director shall provide written notice to any person**  
22 **who has entered into an agreement with the Department of Environ-**

1 **mental Quality under ORS 465.327 related to the facility and who is in**  
2 **substantial compliance with the agreement entered into under ORS**  
3 **465.327. A person receiving notice under this paragraph shall be pro-**  
4 **vided with an opportunity to participate in any negotiations under this**  
5 **section related to an agreement concerning the facility, and the person**  
6 **may provide written comments related to the proposed agreement.**

7 **“(B) At the conclusion of any negotiations described in this para-**  
8 **graph and at least 30 days before submittal to the appropriate circuit**  
9 **court as a proposed consent judgment, the director shall provide**  
10 **written notice of the proposed agreement to any person who has en-**  
11 **tered into an agreement with the department under ORS 465.327 re-**  
12 **lated to the facility.**

13 **“(2)(a) An agreement under this section may provide that the director will**  
14 **reimburse the parties to the agreement from the fund, with interest, for**  
15 **certain costs of actions under the agreement that the parties have agreed to**  
16 **perform and the director has agreed to finance. In any case in which the**  
17 **director provides such reimbursement and, in the judgment of the director,**  
18 **cost recovery is in the public interest, the director shall make reasonable**  
19 **efforts to recover the amount of such reimbursement under ORS 465.200 to**  
20 **465.545 and 465.900 or under other relevant authority.**

21 **“(b) Notwithstanding ORS chapter 183, the director’s decision regarding**  
22 **fund financing under this subsection shall not be appealable to the commis-**  
23 **sion or subject to judicial review.**

24 **“(c) When a remedial action is completed under an agreement described**  
25 **in paragraph (a) of this subsection, the fund shall be subject to an obligation**  
26 **for any subsequent remedial action at the same facility but only to the extent**  
27 **that such subsequent remedial action is necessary by reason of the failure**  
28 **of the original remedial action. Such obligation shall be in a proportion**  
29 **equal to, but not exceeding, the proportion contributed by the fund for the**  
30 **original remedial action. The fund’s obligation for such future remedial**

1 action may be met through fund expenditures or through payment, following  
2 settlement or enforcement action, by persons who were not signatories to the  
3 original agreement.

4 “(3) If an agreement has been entered into under this section, the director  
5 may take any action under ORS 465.260 against any person who is not a  
6 party to the agreement, once the period for submitting a proposal under  
7 subsection (5)(c) of this section has expired. Nothing in this section shall be  
8 construed to affect either of the following:

9 “(a) The liability of any person under ORS 465.255 or 465.260 with respect  
10 to any costs or damages which are not included in the agreement.

11 “(b) The authority of the director to maintain an action under ORS  
12 465.200 to 465.545 and 465.900 against any person who is not a party to the  
13 agreement.

14 “(4)(a)(A) Whenever the director enters into an agreement under this  
15 section with any potentially responsible person with respect to remedial  
16 action, following approval of the agreement by the Attorney General and  
17 except as otherwise provided in the case of certain administrative settle-  
18 ments referred to in subsection (8) of this section, the agreement shall be  
19 entered in the appropriate circuit court as a consent judgment. The director  
20 need not make any finding regarding an imminent and substantial en-  
21 dangerment to the public health, safety, welfare or the environment in con-  
22 nection with any such agreement or consent judgment.

23 “(B)(i) **A person described in subsection (1)(b) of this section who**  
24 **submits written comments to the director regarding the proposed**  
25 **agreement may intervene as a party in the proceedings related to the**  
26 **entry of a consent judgment.**

27 “(ii) **If a person described in subsection (1)(b) of this section inter-**  
28 **venes in the proceedings, the circuit court shall review the proposed**  
29 **agreement, and the circuit court may not enter the proposed agree-**  
30 **ment as a consent judgment, unless the circuit court determines that**

1 **the proposed agreement is fair, reasonable and consistent with the**  
2 **provisions of ORS 465.200 to 465.545 and that any contribution pro-**  
3 **tections provided under subsection (6)(b) of this section are supported**  
4 **by substantial evidence as being in the public interest.**

5 “(b) The entry of any consent judgment under this subsection shall not  
6 be construed to be an acknowledgment by the parties that the release con-  
7 cerned constitutes an imminent and substantial endangerment to the public  
8 health, safety, welfare or the environment. Except as otherwise provided in  
9 the Oregon Evidence Code, the participation by any party in the process  
10 under this section shall not be considered an admission of liability for any  
11 purpose, and the fact of such participation shall not be admissible in any  
12 judicial or administrative proceeding, including a subsequent proceeding  
13 under this section.

14 “(c) The director may fashion a consent judgment so that the entering of  
15 the judgment and compliance with the judgment or with any determination  
16 or agreement made under this section shall not be considered an admission  
17 of liability for any purpose.

18 “(d) The director shall provide notice and opportunity to the public and  
19 to persons not named as parties to the agreement to comment on the pro-  
20 posed agreement before its submittal to the court as a proposed consent  
21 judgment, as provided under ORS 465.320. The director shall consider any  
22 written comments, views or allegations relating to the proposed agreement.  
23 The director or any party may withdraw, withhold or modify its consent to  
24 the proposed agreement if the comments, views and allegations concerning  
25 the agreement disclose facts or considerations which indicate that the pro-  
26 posed agreement is inappropriate, improper or inadequate.

27 “(5)(a) If the director determines that a period of negotiation under this  
28 subsection would facilitate an agreement with potentially responsible per-  
29 sons for taking removal or remedial action and would expedite removal or  
30 remedial action, the director shall so notify all such parties and shall provide

1 them with the following information to the extent the information is avail-  
2 able:

3 “(A) The names and addresses of potentially responsible persons including  
4 owners and operators and other persons referred to in ORS 465.255.

5 “(B) The volume and nature of substances contributed by each potentially  
6 responsible person identified at the facility.

7 “(C) A ranking by volume of the substances at the facility.

8 “(b) The director shall make the information referred to in paragraph (a)  
9 of this subsection available in advance of notice under this subsection upon  
10 the request of a potentially responsible person in accordance with procedures  
11 provided by the director. The provisions of ORS 465.250 (5) regarding confi-  
12 dential information apply to information provided under paragraph (a) of this  
13 subsection.

14 “(c) Any person receiving notice under paragraph (a) of this subsection  
15 shall have 60 days from the date of receipt of the notice to submit to the  
16 director a proposal for undertaking or financing the action under ORS  
17 465.260. The director may grant extensions for up to an additional 60 days.

18 “(6)(a) Any person may seek contribution from any other person who is  
19 liable or potentially liable under ORS 465.255. In resolving contribution  
20 claims, the court shall allocate remedial action costs among liable parties in  
21 accordance with ORS 465.257.

22 “(b) A person who has resolved its liability to the state in an adminis-  
23 trative or judicially approved settlement shall not be liable for claims for  
24 contribution regarding matters addressed in the settlement. Such settlement  
25 does not discharge any of the other potentially responsible persons unless its  
26 terms so provide, but it reduces the potential liability of the others by the  
27 amount of the settlement.

28 “(c)(A) If the state has obtained less than complete relief from a person  
29 who has resolved its liability to the state in an administrative or judicially  
30 approved settlement, the director may bring an action against any person

1 who has not so resolved its liability.

2 “(B) A person who has resolved its liability to the state for some or all  
3 of a removal or remedial action or for some or all of the costs of such action  
4 in an administrative or judicially approved settlement may seek contribution  
5 from any person who is not party to a settlement referred to in paragraph  
6 (b) of this subsection.

7 “(C) In any action under this paragraph, the rights of any person who has  
8 resolved its liability to the state shall be subordinate to the rights of the  
9 state.

10 “(7)(a) In entering an agreement under this section, the director may  
11 provide any person subject to the agreement with a covenant not to sue  
12 concerning any liability to the State of Oregon under ORS 465.200 to 465.545  
13 and 465.900, including future liability, resulting from a release of a hazardous  
14 substance addressed by the agreement if each of the following conditions is  
15 met:

16 “(A) The covenant not to sue is in the public interest.

17 “(B) The covenant not to sue would expedite removal or remedial action  
18 consistent with rules adopted by the commission under ORS 465.400 (2).

19 “(C) The person is in full compliance with a consent judgment under  
20 subsection (4)(a) of this section for response to the release concerned.

21 “(D) The removal or remedial action has been approved by the director.

22 “(b) The director shall provide a person with a covenant not to sue with  
23 respect to future liability to the State of Oregon under ORS 465.200 to  
24 465.545 and 465.900 for a future release of a hazardous substance from a fa-  
25 cility, and a person provided such covenant not to sue shall not be liable to  
26 the State of Oregon under ORS 465.255 with respect to such release at a fu-  
27 ture time, for the portion of the remedial action:

28 “(A) That involves the transport and secure disposition offsite of a haz-  
29 ardous substance in a treatment, storage or disposal facility meeting the re-  
30 quirements of section 3004(c) to (g), (m), (o), (p), (u) and (v) and 3005(c) of

1 the federal Solid Waste Disposal Act, as amended, P.L. 96-482 and P.L. 98-616,  
2 if the director has rejected a proposed remedial action that is consistent with  
3 rules adopted by the commission under ORS 465.400 that does not include  
4 such offsite disposition and has thereafter required offsite disposition; or

5 “(B) That involves the treatment of a hazardous substance so as to de-  
6 stroy, eliminate or permanently immobilize the hazardous constituents of the  
7 substance, so that, in the judgment of the director, the substance no longer  
8 presents any current or currently foreseeable future significant risk to public  
9 health, safety, welfare or the environment, no by-product of the treatment  
10 or destruction process presents any significant hazard to public health,  
11 safety, welfare or the environment, and all by-products are themselves  
12 treated, destroyed or contained in a manner that assures that the by-products  
13 do not present any current or currently foreseeable future significant risk  
14 to public health, safety, welfare or the environment.

15 “(c) A covenant not to sue concerning future liability to the State of  
16 Oregon shall not take effect until the director certifies that the removal or  
17 remedial action has been completed in accordance with the requirements of  
18 subsection (10) of this section at the facility that is the subject of the  
19 covenant.

20 “(d) In assessing the appropriateness of a covenant not to sue under par-  
21 agraph (a) of this subsection and any condition to be included in a covenant  
22 not to sue under paragraph (a) or (b) of this subsection, the director shall  
23 consider whether the covenant or conditions are in the public interest on the  
24 basis of factors such as the following:

25 “(A) The effectiveness and reliability of the remedial action, in light of  
26 the other alternative remedial actions considered for the facility concerned.

27 “(B) The nature of the risks remaining at the facility.

28 “(C) The extent to which performance standards are included in the order  
29 or judgment.

30 “(D) The extent to which the removal or remedial action provides a

1 complete remedy for the facility, including a reduction in the hazardous na-  
2 ture of the substances at the facility.

3 “(E) The extent to which the technology used in the removal or remedial  
4 action is demonstrated to be effective.

5 “(F) Whether the fund or other sources of funding would be available for  
6 any additional removal or remedial action that might eventually be neces-  
7 sary at the facility.

8 “(G) Whether the removal or remedial action will be carried out, in whole  
9 or in significant part, by the responsible parties themselves.

10 “(e) Any covenant not to sue under this subsection shall be subject to the  
11 satisfactory performance by such party of its obligations under the agree-  
12 ment concerned.

13 “(f)(A) Except for the portion of the removal or remedial action that is  
14 subject to a covenant not to sue under paragraph (b) of this subsection or  
15 de minimis settlement under subsection (8) of this section, a covenant not  
16 to sue a person concerning future liability to the State of Oregon:

17 “(i) Shall include an exception to the covenant that allows the director  
18 to sue the person concerning future liability resulting from the release or  
19 threatened release that is the subject of the covenant if the liability arises  
20 out of conditions unknown at the time the director certifies under subsection  
21 (10) of this section that the removal or remedial action has been completed  
22 at the facility concerned; and

23 “(ii) May include an exception to the covenant that allows the director  
24 to sue the person concerning future liability resulting from failure of the  
25 remedial action.

26 “(B) In extraordinary circumstances, the director may determine, after  
27 assessment of relevant factors such as those referred to in paragraph (d) of  
28 this subsection and volume, toxicity, mobility, strength of evidence, ability  
29 to pay, litigative risks, public interest considerations, precedential value and  
30 the inequities and aggravating factors, not to include the exception referred



1 to in paragraph (f)(A) of this subsection if other terms, conditions or re-  
2 quirements of the agreement containing the covenant not to sue are suffi-  
3 cient to provide all reasonable assurances that public health, safety, welfare  
4 and the environment will be protected from any future release at or from the  
5 facility.

6 “(C) The director may include any provisions allowing future enforcement  
7 action under ORS 465.260 that in the discretion of the director are necessary  
8 and appropriate to assure protection of public health, safety, welfare and the  
9 environment.

10 “(8)(a) Whenever practicable and in the public interest, as determined by  
11 the director, the director shall as promptly as possible reach a final settle-  
12 ment with a potentially responsible person in an administrative or civil  
13 action under ORS 465.255 if such settlement involves only a minor portion  
14 of the remedial action costs at the facility concerned and, in the judgment  
15 of the director, both of the following are minimal in comparison to any other  
16 hazardous substance at the facility:

17 “(A) The amount of the hazardous substance contributed by that person  
18 to the facility; and

19 “(B) The toxic or other hazardous effects of the substance contributed by  
20 that person to the facility.

21 “(b) The director may provide a covenant not to sue with respect to the  
22 facility concerned to any party who has entered into a settlement under this  
23 subsection unless such a covenant would be inconsistent with the public in-  
24 terest as determined under subsection (7) of this section.

25 “(c) The director shall reach any such settlement or grant a covenant not  
26 to sue as soon as possible after the director has available the information  
27 necessary to reach a settlement or grant a covenant not to sue.

28 “(d) A settlement under this subsection shall be entered as a consent  
29 judgment or embodied in an administrative order setting forth the terms of  
30 the settlement. The circuit court for the county in which the release or

1 threatened release occurs or the Circuit Court of Marion County may en-  
2 force any such administrative order.

3 “(e) A party who has resolved its liability to the state under this sub-  
4 section shall not be liable for claims for contribution regarding matters ad-  
5 dressed in the settlement. The settlement does not discharge any of the other  
6 potentially responsible persons unless its terms so provide, but it reduces the  
7 potential liability of the others by the amount of the settlement.

8 “(f) Nothing in this subsection shall be construed to affect the authority  
9 of the director to reach settlements with other potentially responsible per-  
10 sons under ORS 465.200 to 465.545 and 465.900.

11 “(9)(a) Notwithstanding ORS chapter 183, except for those covenants re-  
12 quired under subsection (7)(b)(A) and (B) of this section, a decision by the  
13 director to agree or not to agree to inclusion of any covenant not to sue in  
14 an agreement under this section shall not be appealable to the commission  
15 or subject to judicial review.

16 “(b) Nothing in this section shall limit or otherwise affect the authority  
17 of any court to review, in the consent judgment process under subsection (4)  
18 of this section, any covenant not to sue contained in an agreement under this  
19 section.

20 “(10)(a) Upon completion of any removal or remedial action under an  
21 agreement under this section, or pursuant to an order under ORS 465.260, the  
22 party undertaking the removal or remedial action shall notify the department  
23 and request certification of completion. Within 90 days after receiving no-  
24 tice, the director shall determine by certification whether the removal or  
25 remedial action is completed in accordance with the applicable agreement  
26 or order.

27 “(b) Before submitting a final certification decision to the court that ap-  
28 proved the consent judgment, or before entering a final administrative order,  
29 the director shall provide to the public and to persons not named as parties  
30 to the agreement or order notice and opportunity to comment on the

1 director's proposed certification decision, as provided under ORS 465.320.

2 “(c) Any person aggrieved by the director's certification decision may  
3 seek judicial review of the certification decision by the court that approved  
4 the relevant consent judgment or, in the case of an administrative order, in  
5 the circuit court for the county in which the facility is located or in Marion  
6 County. The decision of the director shall be upheld unless the person chal-  
7 lenging the certification decision demonstrates that the decision was arbi-  
8 trary and capricious, contrary to the provisions of ORS 465.200 to 465.545 and  
9 465.900 or not supported by substantial evidence. The court shall apply a  
10 presumption in favor of the director's decision. The court may award attor-  
11 ney fees and costs to the prevailing party if the court finds the challenge  
12 or defense of the director's decision to have been frivolous. The court may  
13 assess against a party and award to the state, in addition to attorney fees  
14 and costs, an amount equal to the economic gain realized by the party if the  
15 court finds the only purpose of the party's challenge to the director's deci-  
16 sion was delay for economic gain.

17 **“SECTION 2. The amendments to ORS 465.325 by section 1 of this  
18 2013 Act apply to:**

19 **“(1) Agreements described in ORS 465.325 entered into on or after  
20 the effective date of this 2013 Act.**

21 **“(2) Agreements described in ORS 465.327 entered into on or after  
22 the effective date of this 2013 Act.**

23 **“SECTION 3. This 2013 Act being necessary for the immediate  
24 preservation of the public peace, health and safety, an emergency is  
25 declared to exist, and this 2013 Act takes effect on its passage.”.**

26